UNIVERSITY OF PENNSYLVANIA
LAW REVIEW
AND AMERICAN LAW REGISTER

FOUNDED 1852

Published Monthly (Except July, August and September) by The Department of Law of the University of Pennsylvania, 34th and Chestnut Streets, Philadelphia, Pa.

VOLUME 58 JANUARY NUMBER 4

SUBSCRIPTION PRICE, $3.00 PER ANNUM, SINGLE COPIES, 35 CENTS

NOTES.

DELEGATION OF LEGISLATIVE POWER—VALIDITY OF REGULATION OF RAILROAD COMMISSION.

In a recent Georgia case the question of the delegation of legislative power was fully discussed. Inquiry into what constituted a delegation of such power, and is therefore unconstitutional, or, to call a spade a spade, to what extent it can be delegated, is peculiarly pertinent in this day of regulation by commissions.

The Georgia constitution vested the legislative power in a General Assembly. That body, by the Act of August 23, 1905,[1] empowered the Railroad Commission to make, prescribe and enforce such reasonable rules, regulations and orders as should be necessary to compel railroads to promptly receive, deliver, etc., all freights; and to provide the time within which railroads

[1] *Ga. Laws*, 1905, p. 120.

should furnish cars applied for in writing by shippers, and the penalty to be paid in the event of such cars not being furnished. In exercise of the power thus conferred, the Commission established Rule 9, requiring that cars be furnished shippers within four days after written application therefor, and imposing a penalty of one dollar per car per day after the expiration of the free time, to be paid to the shipper. The Supreme Court of Georgia held that Rule 9 was not void as an exercise of legislative power attempted to be delegated by the Act of 1905.[2]

In spite of a vehement dissent, it is fair to say that the majority opinion represents the trend of modern authority. All courts recognize the general proposition that purely legislative power, having been entrusted by the people to the legislature, cannot be delegated by that body.[3] The ground for this rule is that the constitution in distributing the three fundamental powers of government, impliedly forbids their delegation. The courts are not at one as to the basis of this implication. The most reasonable way to ascertain its existance, the examination of the political theories predominant at the time of the adoption of the constitution in question, has seldom been adopted. Instead the principles of the Common Law are appealed to and the doubtful analogy of agency relied upon for support of the non-delegability rule.[4] The legislature being the agent of the people for the purpose of exercising legislative functions, cannot place that office in the hands of a subordinate.

Whatever ground the rule is put upon, two apparent exceptions must be explained. It is never questioned that the legislature can delegate the power of self-government to localities. This is satisfactorily accounted for by the theory that the maxim against the delegability of legislative power must be "understood in the light of the immemorial practice of this country and of England, which has always recognized the propriety and policy of vesting in the municipal organizations certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority."[5] The justification of the admitted constitutionality of contingent legislation is more logical, and savors less of apology, as it

[2] *So. Ry.* v. *Melton,* 65 S. E. 665.

[3] *Ry. Co.* v. *R. R. Comm.,* 161 Fed. 925, 985; *Wayman* v. *Southard,* 10 Wheaton 1, 10; *State* v. *Ry. Co.,* 47 So. 969, 976. See also cases cited in 57 Am. L. Reg. 70, n. 26.

[4] 57 Am. L. Reg. 70, n. 27.

[5] *Cooley, Const'l Lim.* (Fed.) 165.

falls in with the next step in the general rule that may now be considered.

Although the legislature "may not delegate the power to enact a law or to declare what the law shall be, or to exercise an unrestricted discretion in applying the law, it may enact a law, complete in itself, designed to accomplish a general public purpose," [6] and empower subordinate bodies of officials either to ascertain facts [7] determining the application of the law, or pass rules and regulations [8] suitable to its complete execution. In other words, after a complete expression of the legislative intent, the means of its fulfillment may be left to ministerial officers. In an early Ohio case the rule was clearly stated as follows: "The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." [9] In accordance with these principles, conditional legislation is considered to be complete as a law, although the duty of ascertaining whether and to what extent it shall operate is placed by the legislature upon other shoulders.[10] In like manner the regulation of various kinds of business by commissions is supported on the theory that in the act creating the commission definite principles of law were laid down, the application of which to the varying minutiæ of economic conditions was to be determined by the subordinate body.[11] In theory this is sound, but in many of the cases so loose directions are given by the legislature, and the discretion left to the commissions is so broad, that the rule would seem to have been consumed away in its application. This seems to be true of acts empowering commissions to name "reasonable rates," the use of that legal

---

[6] *State* v. *Ry. Co.* (*supra*).

[7] *Prentice* v. *Eagan,* Comm. Cl. of Fed. Const. 311; *Co.* v. *U. S.,* 204, U. S. 364, and cases there cited.

[8] *R. R.* v. *R. R. Comm.,* 70 Ga. 694, 699.

[9] *R. R.* v. *Comm.,* 1 Ohio 77.

[10] *Elwell* v. *Comstock,* 99 Minn. 261, (Act authorizing the official use of a voting machine if discovered to be efficient); *Trinity Co.* v. *Mendocino Co.,* 151 Cal. 279, (Act authorizing a commission to mark boundary lines between counties); *ex parte* McManus, 70 Pac. 702, (Act authorizing boards to grant or refuse state licenses for exercising certain professions); *The Aurora,* 7 Cranch 382, (Revival of act depending on future event to be ascertained and proclaimed by the president); *Field* v. *Clark,* 143 U. S. 649, (Act empowering president to put reciprocal tariff into effect against the various countries).

[11] *State* v. *Ry. Co.* (*supra*).

term being very elastic. Such legislation has, however, been justified on the ground that at best the line of demarcation between delegable and non-delegable powers is hazy,[12] and that an act of the legislature should not be declared unconstitutional except on the plainest ground.[13]

The act in the principal case seems to be less open to criticism than many that the courts have had no trouble in sustaining. Its directions are explicit as to the object and nature of the regulations to be made, the propriety of which ought not to be questioned in view of their similarity to rules of demurrage and reciprocal demurrage, the authority of commissions to enact which has never been successfully questioned.[14]

The objection is often urged against an act which, like the one in question, empowers the commission to fix "penalties" for breach of its regulations, that it delegates the power to enact penal laws. The looseness of the use of the terms penal and penalty is, however, well recognized, and an analysis of the exaction imposed in the principal case shows it to be not within the strict sense of the word penalty, which alone is applicable to the principle of non-delegability. A penal law in the strict sense is one, an offence against which is within the pardoning power of the sovereignty,[15] and when a remedy is given for a private injury to an individual, by means of an action instituted by the aggrieved party, it is not a penalty within the narrow meaning of that term.[16]

E. S. B.

STATE DECISIONS AS PRECEDENTS IN FEDERAL COURTS.

The amended Constitution of Missouri provides that "Private property shall not be taken or damaged for public use, without just compensation." [1] In a decision under this clause, *Johnson* v. *St. Louis*,[2] the question came before the Circuit Court of Appeals, whether a plaintiff, who had notice that the city was about to lay a sewer in front of his buildings, and who took no steps to prop his wall, could recover for an injury caused by

---

[12] *Ry.* v. *Dey*, 35 Fed. 866; *Wayman* v. *Southard*, 10 Wheaton 1.

[13] *Boston* v. *Cummins*, 16 Ga. 102.

[14] *R. R.* v. *Keystone Lumber Co.*, 90 Miss. 391.

[15] *Huntington* v. *Attrill*, 146 U. S. 657.

[16] *Mansfield* v. *Ward*, 16 Me. 433; *Boice* v *Gibbons*, 8 N. J. L. 324; *Sackett* v. *Sackett*, 25 Mass. 309.

[1] Ann. St. 1906, p. 148, art. 2, sec. 21.

[2] 172 Fed. 31.

same, it being admitted that he could not recover under a similar state of facts, against a private individual, and his cause of action being based entirely on the words "or damaged" in the above clause.

The Court held that it was a question in which they were bound to follow the decisions of the State of Missouri. The opinion was, in part, as follows: "This case involves the extent of the liability of a municipal corporation of that State (Mo.), and that liability depends entirely upon the interpretation of the amended Constitution of Missouri. The national courts uniformly follow the construction of the Constitution and Statutes of a State, announced by its highest judicial tribunal, in all cases which, like that in hand, present no question of general or commercial law, and no question of right under the national Constitution and acts of Congress. The character and the extent of the powers and liabilities of the political or municipal corporations of a State are questions of local law, upon which the decisions of the Supreme Court of the State are authoritative in the Federal courts * * *" The Court decided that, under the Missouri decisions, the plaintiff was not entitled to recover.

In *Messinger* v. *Anderson*,[3] the Circuit Court of Appeals held that "there is no duty devolving upon a court of the United States to follow a State court in its construction of a will, * * * unless the opinion of the State court is declaratory of the settled law of the State, and not merely a decision on the particular instrument."

These two decisions are typical examples of when the Federal courts do and when they do not follow the decisions of the State courts.

This question, however, must be carefully distinguished from the doctrine of *Res Adjudicata*.[4] The doctrine of *Res Adjudicata* is based on the maxim *"Nemo debet bis vexari pro eadem causa."* It applies properly, only when the precise question was raised and determined in the former suit between the same parties or their privies. Insofar as it has to do with the relation of Federal and State courts, this doctrine may be briefly stated as follows:

While the courts of the United States are not foreign courts, in their relation to the State courts, they are courts of a different sovereignty, exercising a distinct and independent jurisdiction, and are bound to give to the judgments of the State

[3] 171 Fed. 785.

[4] Van Fleet's Former Adjudication, 790, 791; Black, Judgments, sec. 938-C., *Fuller* v. *Hamilton*, 53 Fed. 411.

courts only the same faith and credit, which courts of another State are bound to give them. In all cases the jurisdiction of the State court may be inquired into, when its judgment is made the foundation of a claim in the Federal courts; but the inquiry can go no further. The merits are not open to re-examination.[5] Conversely, if the Federal court had jurisdiction, its judgment or decree is as binding and conclusive upon the parties in the State court, as would be the judgment of a sister State.[6]

It is not, however, within the purview of this note to discuss *Res Adjudicata* in detail. Exhaustive notes on this subject are to be found elsewhere.[7]

But it may be profitable to discuss in some detail the question of State decisions as precedents in the Federal courts, within the limits properly and accurately embraced in that title.

The decisions of the highest Court of a State, that an act of the legislature is not in conflict with the provisions of the State Constitution, are conclusive on the Federal courts, except where the Federal Constitution and laws are involved.[8]

The construction given to a statute of a State by the highest judicial tribunal of such State is binding upon the courts of the United States.[9]

When, however, contracts have been entered into, and rights have accrued thereon, under a particular state of the decisions, or when there have been no decisions of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation, although a different interpretation may be adopted by the State courts after such rights have accrued.[10] Where a local law or custom has been established by repeated decisions of the highest court of a State, it usually becomes the law governing the Federal courts sitting in that State.[11] Where decisions have become rules of property laid down by the highest court of a State, by which are meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession of same, they are to be treated as

---

[5] *Pennoyer* v. *Neff*, 95 U. S. 714.

[6] *Crescent Co.* v. *Union*, 120 U. S. 141.

[7] See notes, 21 C. C. A. 478; 49 C. C. A. 468.

[8] *Chesapeake R. R.* v. *Ky.*, 179 U. S. 388.

[9] *Warbotton* v. *White*, 176 U. S. 484; *Christy* v. *Pridgeon*, 4 Wall 196; *Cutter* v. *Huston*, 158 U. S. 429. See also cases in 13 Cent. Dig. Col. 2734, *et seq.*

[10] *Burgess* v. *Seligman*, 107 U. S. 33; *Louisville R. R.* v. *Gaines*, 3 Fed. 266.

[11] *Bucher* v. *Cheshire R. R. Co.*, 125 U. S. 555.

rules of decision by the Federal courts.[12] This principle has been applied in numberless cases, among which may be mentioned *Conway* v. *Taylor's Exec.*,[13] involving property in a ferry franchise; *Van Bokelen* v. *R. R.*,[14] involving the question of damages for laying tracks in front of buildings. Where many land titles would be shaken by departing from the principles involved in the series of State decisions, the Supreme Court of the United States, in Equity, will follow the rule as adopted by the State courts, even though the principle is deemed by the Court incorrect.[15]

On questions not of local law, but of general jurisprudence, the Federal courts, in the absence of express statutes, will exercise their own judgment without regard to State decisions. Just what are questions of general jurisprudence is not very definite under the decisions of the Supreme Court.[16] In the leading case of *Swift* v. *Tyson*,[17] Story, J., decided that the Judiciary Act of 1789, sec. 34 (which is declaratory of the common law principle of *lex loci*), providing that "the laws of the several states, except where the Constitution, treaties or statutes of the Unites States shall otherwise provide, shall be regarded as rules of decision in trials at common law in the United States courts," did not apply to actions on commercial paper. In that case, Story, J., refused to follow the New York decisions as to what constitutes a holder in due course. Other instances of general jurisprudence, where State decisions will not be followed, are the construction of a policy of marine or fire insurance,[18] carriers' stipulations limiting their liability for negligence,[19] a railroad's liability under fellow servant doctrine.[20] The construction of a particular deed or devise is considered a question of general law. Thus, in *Lane* v. *Vick*,[21] it was held "the decision of a State court construing a will does not * * * constitute a rule of decision for the Supreme Court of the United States, unless the decision of the State

---

[12] *Clarke* v. *Clarke*, 178 U. S. 186.

[13] 66 U. S. 603.

[14] 5 Blatchf. 379.

[15] *Bodley v. Taylor*, 9 U. S. 191.

[16] *Ins. Co.* v. *Chicago R. R.*, 70 Fed. 201, at p. 209.

[17] 16 Peters 1.

[18] *Donnell* v. *Columbian Ins. Co.*, 2 Sumn. 366; *Carpenter* v. *Providence Ins. Co.*, 16 Pet. 495.

[19] *N. Y. Central R. R.* v. *Lockwood*, 17 Wall. 357.

[20] *Baltimore R. R.* v. *Baugh*, 149 U. S. 368.

[21] 44 U. S. 464.

court has been long acquiesced in so as to become a rule of property." There are a number of cases on this point.[22]

There are many other cases involving liability for negligence or torts, exemption from liability, general and commercial law, which are more or less in conflict and from which it is very difficult to generalize or frame any definite rules.[23]

It might be noted, finally, that in all cases, where the Federal courts have a right to exercise independent judgment they will nevertheless tend toward an agreement with the State courts,[24] and that the Federal courts usually follow the decisions of the highest State tribunals only.[25]

E. A. L.

Fiduciary Capacity of Promoters. Liability to Corporation for Secret Profits.

The Supreme Court of Massachusetts recently handed down an exhaustive and able opinion on the liability of a promoter to a corporation for secret profits. *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow,* 89 N. E. 193. The defendant and one Lewisohn framed a scheme for capitalizing the plaintiff company. The amount of capital was to be $3,750,000. Of this, $3,250,000 was paid to the two promoters in stock, in payment for certain mining property for which they had paid $1,000,000. This was the entire issue of stock existing at the time of the purchase of the property by the corporation. The remaining $500,000 of capital stock was issued to the public at par for cash. This entire scheme was carried out without providing the plaintiff company with an independent board of directors or advisors, to pass upon the wisdom of the purchase, and without disclosing the substance of the transaction and the extraordinary profit of the promoters, to the purchasers of the stock at par for cash. The plaintiff company sought to recover the secret profits realized by the defendant from his sale of the property to it. The Court based its decision, allowing recovery, on the following reason-

---

[22] *Barber* v. *Pittsburg R. R.,* 166 U. S. 83; *Foxcroft* v. *Mallett,* 4 How. 353; *Thomas* v. *Hatch,* 3 Sumn. 176.

[23] See dissenting opinion of Caldwell, J., in *Ins. Co.* v. *Chicago R. R.,* 70 Fed., at p. 209. *Compare: Bucher* v. *R. R.,* 125 U. S. 555, with *Sawyer* v. *Oakman,* 7 Blatchf. 290. *Compare: Berry* v. *Lake Erie R. R.,* 70 Fed. 679, with *Kowalski* v. *Chicago R. R.,* 84 Fed. 586.

[24] *Baltimore R. R.* v. *Baugh,* 149 U. S. 368; *Clark* v. *Bever,* 139 U. S. 96.

[25] *Potapsco Guano Co.* v. *Morrison,* 2 Woods (U. S.) 395.

ing. A promoter is a fiduciary to the corporation and as such is not entitled to make any secret profit out of transactions in which he acts in his fiduciary capacity. This relation continues until the creation of the artificial being is complete. So, when the scheme of promotion contemplates the procurement of working capital from the public, the obligation of faithfulness stretches the length of the plan. To be sure the original sale to the company did not constitute an actionable tort, as all the stock issued up to that time was taken by the defendant in payment for the property, and the corporation though wronged could not recover as the lips of its only stockholder were sealed, by reason of his having, himself, been vendor in the objectionable sale. But as the fiduciary obligation of the defendant included the entire scheme, subsequent original subscribers who had not consented to or been informed of the purchase were entitled to object, and procure a suit to be brought in the name of the corporation for the recovery of the secret profit.

It is a well-settled principle of equity that those who participate in bringing about the formation of a corporation assume the obligations of a trust towards the company and towards those who shall be invited to come into the enterprise as stockholders and share in its fortunes.[1] This principle has been said to be due to the equitable rule that fastens a trust upon one who has such power over another and his affairs as to give the former an opportunity to make personal gains in his dealings with the latter.[2]

There has been some difficulty in determining what is the duration of the fiduciary relation. The best doctrine is that of the principal case that it lasts until the corporation's share capital is taken and it is provided with a board competent to protect its interests.[3] For, so long as there are prospective original subscribers to stock and the promoters and those concerting with them remain in control of the corporation it is in a situation to be deceived.

Having discovered the nature and extent of the promoter's

---

[1] *Dickerman* v. *Co.*, 176 U. S. 181, basing the rule on the ground that the promoter is an agent and subject to the ordinary disabilities. *The Telegraph* v. *Loetscher*, 127 Ia. 383, which speaks of the situation of a promoter as akin to that of an agent or trustee of the company, *Macey Co.* v. *Macey*, 143 Mich. 138; *Land Co.* v. *Lewis*, 101 Me. 78; *Co.* v. *Wilcox*, 64 Conn. 101.

[2] *Yeiser* v. *Co.*, 107 Fed. 340.

[3] *Pietsch* v. *Milbraith*, 123 Wis. 647. See also, *In re Leeds, &c., Theatre*, L. R. 1892, 2 Ch. D. 809; *Groel* v. *Co.*, 70 N. J. Eq. 316; *Hayward* v. *Leeson*, 176 Mass. 310.

duty, it follows that if during the continuance of it he is guilty of any act in the nature of a breach of trust by which he reaps a benefit at the expense of the corporation, he is liable to the corporation for the secret profit. This general rule is well settled,[4] and is most frequently applied in cases of sales of property by the promoter to the corporation. Some difficulty arises however in determining just what circumstances will prevent a particular transaction from being within the scope of the trust relation, or, if it is within it, what amount of disclosure will constitute a compliance with the trust obligation.

Cases in which a promoter sells property to a corporation which he has organized fall into two general classes; first, those in which the promoter owned the property before the organization of the corporation, and second, where he merely had an option on it, so that the final actual sale was between the original owner and the corporation through the promoter. The first class of case does not give rise to so many or so high duties as the second. For, it is unquestionable that the owner of property may organize a corporation for the purpose of selling the property to it, and his only duty is to supply the creature of his creation with a board of directors, not dependent upon and subservient to himself.[5] He is then not the agent of the corporation *qua* the purchase of the property, as that took place before the corporation's existence, and he may therefore sell it to the corporation at any price that he can fairly get, without being held liable for his profit.[6] But when in this class of case the corporation is not represented by an independent board of directors, the rule is laid down that there must be full disclosure of all the facts connected with the transaction, to everybody concerned, in order to avoid liability.[7] This means that disclosure of the ownership of the property must be made to the allottees of the original shares by means of a prospectus or a meeting of shareholders.[8]

In the second class of case, namely, where the promoter had merely an option on the property before the organization of

---

[4] *Laudenslager* v. *Co.*, 58 N. J. Eq. 556; *Parker* v. *Nickerson*, 137 Mass. 487; *Lydney, &c., Co.*, v. *Bird*, 33 Ch. D. 85.

[5] *Erlanger* v. *Co.*, L. R. 3 A. C. 1218.

[6] *Densmore Co.* v. *Densmore*, 64 Pa. 43, approved in *Burbank* v. *Dennis*, 101 Cal. 90; *Lungren* v. *Pennel*, 10 W. N. C. 297; *McElhenny's Appeal*, 61 Pa. 188; *Foss* v. *Harbottle*, 2 Hare 461; *Semble*, *Old Dominion Co.* v. *Bigelow*, 188 Mass. 315.

[7] *Erlanger* v. *Co.*, L. R. 3 A. C. 1218; *Land Co.* v. *Lewis*, 101 Me. 78; *Hayward* v. *Leeson*, 176 Mass. 310.

[8] *In re Leeds, &c.*, L. R. 1892, 2 Ch. D. 309, Alger, Promoters, §46.

the corporation and the sale was in fact by the original owner to the corporation, through the promoter, the latter is in the fiduciary position of an agent, and as such is not entitled to make any profit out of the transaction.[9] The reason is that the agent is supposed to be dealing in the interest of his principal,[10] who has a right to the full benefit of any bargain that the agent can make.[11] In such a case liability for profits can be avoided only by a full disclosure of the fact and amount of the profit,[12] and an intelligent and independent consent by the corporation thereto.[13]

In all of the cases just considered one fact may exist which will avoid all liability on the part of the promoter. If he himself takes, in payment for the property conveyed, the entire original issue of stock, the corporation cannot recover from him his secret profit.[14] In other words if the vendee comprises no other persons than the vendor, the former cannot be heard to complain as the transaction is nothing more than a change in the form of ownership of the property. Or, to take the point of view of the principal case, the corporation is in fact wronged, but no remedy is allowed, as the mouths of all the members of the corporation are closed. This proposition is undisputed. It also is settled that when a sale to a corporation is not open to objection for the above reasons, a subsequent *bona fide* change of plan resulting in a further issue of stock to original subscribers, who are not cognizant of the objectionable transaction, does not give them any ground of complaint on discovery thereof.[15] There is, however, some conflict of authority on the rule applicable when the sale to the corporation cannot be objected to at the time because all the then shareholders are parties to it, but the scheme of incorporation contemplates a further allotment of shares to other original subscribers to whom full disclosure is not made. The

[9] *Mellish, L. J., in Grover's Case,* 1 Ch. D. 182; *Land Co.* v. *Laudenslager,* 35 Alt. 436. *Contra,* (on ground that situation is same as if promoter had purchased before organization); James, L. J., in Grover's Case (*supra*); *Fruit Co.* v. *Buck,* 52 N. J. Eq. 219.

[10] *Densmore Co.* v. *Densmore,* 64 Pa. 43; *Simons* v. *Oil Co.,* 61 Pa. 202.

[11] *Davis* v. *Hamlin,* 108 Ill. 39.

[12] *Bosher* v. *Land Co.,* 89 Va. 455, Alger, Promoters, §42.

[13] *Land Co.* v. *Case,* 104 Mo. 572; *Broderip* v. *Salomon,* L. R. 1895, 2 Ch., 323.

[14] *In re. Mining Co.,* 14 Ch. D. 390; *Blum* v. *Whitney,* 185 N. Y. 232; *McCraken* v. *Robinson,* 57 Fed. 375; *Foster* v. *Seymour,* 23 Fed. 65; *Thompkins* v. *Sperry,* 96 Md. 560.

[15] *In re Box Co.,* 17 Ch. D. 467.

majority of courts holds that, in such a case, the subsequent allottees can, upon discovering the nature of the transaction procure a suit to be brought by the corporation to recover the secret profit. The ground for this rule is, that the fiduciary capacity of the promoter is co-extensive with the scheme of promotion,[16] that at the time of the sale he acts under a duty to contemplated original shareholders,[17] and therefore that they can recover the secret profit from him. This is the ground taken by the Court in the principal case.

There is, however, some support for a contrary rule, and the fact that the United States Supreme Court is among the tribunals promulgating it necessitates its respectful examination. The ground on which it rests is that a corporation is an entity, which is bound by its original consent to the purchase, and that its position is not altered by the issue of additional stock to original subscribers.[18] It is submitted that this proposition is completely answered by the doctrine of the principal case which is as follows: The reason that a corporation cannot object to a sale to it by the promoter where either the promoter has taken all the stock, or all the original subscribers have consented is not that no wrong has been committed, but "that the corporation is estopped by reason of the fact that all the persons with financial concern in the matter have assented with knowledge, and thus the lips of everybody are sealed. Whatever wrong has been done has been condoned. The maxim *'volenti non fit injuria'* is invoked." But "the wrong is done to the corporation as an independent entity and thus the rights of those who are *or may become* stockholders are affected." "Subsequent subscriptions to the original stock as a part of the scheme of promotion, do not change the identity of the corporation, but remove an impediment for the enforcement of a remedy for a wrong previously done the corporation."

E. S. B.

ADMIRALTY—PRIVITY OR KNOWLEDGE OF OWNER UNDER THE LIMITED LIABILITY ACT.

Just what constitutes privity or knowledge on the part of the owner of a vessel so as to bar him from taking advantage

[16] *Pietsch* v. *Milbraith*, 123 Wis. 647.

[17] *Land Co.* v. *Lewis*, 101 Me. 78; *Mining Co.* v. *Spooner*, 74 Wis. 307; *Groel* v. *Electric Co.*, 70 N. J. Eq. 616; *Hayward* v. *Leeson*, 176 Mass. 310.

[18] *Old Dominion Co.* v. *Lewisohn*, 210 U. S. 206.

of the act limiting his liability to the value of the vessel has been much discussed. The question arose recently in the case of *Sanbern* v. *Wright & Cobb Lighterage Co.*,[1] where an action was brought for damages for the loss of a cargo caused by the capsizing of a barge, which the evidence showed was unseaworthy. The defendant corporation sought to limit its liability to the value of the barge. The general manager of the corporation was responsible for the condition of the boat, and it appeared that he had made a perfunctory examination before the voyage. He testified that they repaired whatever appeared necessary; if the boat leaked, she was repaired; if not, nothing was done. The Court held that such a method—"leaving it to the progress of decay to develop signs of weakness"—was not a proper exercise of the owner's duty, and the defendant was denied the benefit of the act.

The Limited Liability Act was passed to encourage shipbuilding and to induce capitalists to invest money in this branch of industry. Therefore, it is evident that the privity or knowledge required by the act means the personal privity or knowledge of the owners, and not merely the privity or knowledge of their agents;[2] because, if construed otherwise, the act would be of no practical effect.

Where the owner is a corporation, the rule is that knowledge of some defect by an agent or employee is not the knowledge of the corporation so as to defeat its right to the exemption; but the knowledge of the president or other high officer of the corporation would be. In *Butler* v. *Boston S. S. Co.*,[3] an accident occurred because the second mate, who was not a licensed pilot, had charge of the ship. The Court held that the captain was in command, and it was his duty to see that a qualified pilot was employed, and his negligence did not deprive the corporation of its right to limit its liability. In another case[4] the privity or knowledge of a wrecking master employed by the agent of an underwriter was held not to be the privity or knowledge of the underwriter. (For the purpose of receiving the benefit of the act an underwriter is considered an owner.)

It is the duty of the owner to provide a seaworthy vessel, and if loss occurs through his neglect in this particular, he is liable, and cannot claim the statutory limitation.[5] Thus the

[1] 171 Fed. 449.

[2] *Lord* v. *Goodall, etc., S. S. Co.*, 4 Sawyer 292.

[3] 130 U. S. 527.

[4] *Craig* v. *Ins. Co.*, 141 U. S. 638.

[5] *Lord* v. *Goodall, etc., S. S. Co.*, 4 Sawyer 292.

right to the benefit of the act was refused where the owner failed to inspect the vessel to ascertain her condition before the voyage, and damage occurred subsequently because of her unseaworthiness.[6]

But the owner may satisfy this duty by employing a competent agent to inspect the vessel; and the subsequent neglect of such agent is not with the privity and knowledge of the owner, unless the defects overlooked were of such character as to be detected by the inspection of an unskilled person.[7]

In *Quinlan* v. *Pew*,[8] the owners of a vessel employed a master to put the vessel into condition. There was a defect in the rigging, known to the master before the vessel sailed, but unknown to the owners. As a result of this defect one of the crew was injured. It was held that the owners were not privy to the defect. Again where a vessel was rendered unseaworthy by the method in which the master and crew loaded her, the corporation which owned her was allowed the exemption of the act.[9]

Under the English statute, in the case of *The Warkworth*,[10] a collision was caused by a defect in the steering gear of the vessel. The owners had employed a man to inspect the vessel, and it was through his negligence that the defect was not discovered. It was held that the owners could limit their liability.

If, however, the owner makes the examination of the vessel himself, he is liable if his failure to discover a defect is due to his negligent inspection. In *The Republic*,[11] a barge belonging to a corporation was inspected by the president before it was used for an excursion. Its unsafe condition was apparent, but nothing was done. An accident resulted, and the corporation was not allowed the benefit of the act. And where the manager and superintendent of a corporation hastily inspected one of the corporation's barges, and failed to discover several broken timbers, the corporation was not allowed to limit its liability when the barge subsequently sank.[12] The principal case also comes directly under this rule.

To summarize: The privity or knowledge must be the *per-*

---

[6] *In re Meyers Excursion Co.*, 57 Fed. 240.
[7] *The Annie Faxon*, 75 Fed. 312.
[8] 56 Fed. 111.
[9] *The Colina*, 82 Fed. 665.
[10] 9 Prob. Div. 20.
[11] 61 Fed. 109.
[12] *Oregon Lumber Co.* v. *S. S. Co.*, 162 Fed. 912.

sonal privity or knowledge of the owner himself, and not merely of his agent. Where the defect or negligence bears upon the seaworthiness of the vessel, the owner must either make a diligent inspection himself, or appoint a competent person to make such inspection for him. Where a corporation is owner, the privity or knowledge of the corporation is measured by the privity or knowledge of its responsible officers.

R. C. H.

THE DOCTRINE OF THE TURNTABLE CASES IN ENGLAND.

The doctrine of the so-called "Turntable Cases" has long been a subject of heated discussion in the United States, but the question did not arise in the English courts till a few months ago, when, in *Cooke* v. *Midland Great Western Ry. of Ireland*,[1] the House of Lords, relying on *Lynch* v. *Nurdin*,[2] adopted the doctrine as laid down in the more moderate American cases. In this case the railway company kept a turntable unlocked on their land close to the public road. Employes of the company knew that children were in the habit of playing on the turntable and the adjoining premises, to which there was easy access through a gap in the hedge. In holding that there was evidence of actionable negligence the injured child was considered as a *licensee* of the defendant company. Lord McNaghten in his opinion says: "Persons may not think it worth their while to take ordinary care of their own property, and may not be compellable to do so; but it does not seem unreasonable to hold that, if they allow their property to be open to all comers, infants as well as children of a maturer age, and place upon it a machine attractive to children and dangerous as a plaything,[a] they may be responsible in damages to those who resort to it with their *tacit permission*, and who are unable, in consequence of their tender age, to take care of themselves." In holding the injured child a licensee of the defendant company, the House of Lords bring their decision within the general principles as to the duties owed by

[1] L. R., 1909, App. Cas. 229.

[2] 6 Ad. & E. 30.

[a] In a recent Scotch case (*Holland* v. *Lanarkshire, etc., Committee*, 1909 S. C. 1142) recovery was denied to a child, injured by a fall into a quarry under similar circumstances, on the ground that a quarry differed from a "dangerous machine of an alluring character," such as a turntable.

an occupier of real property toward trespassers and licensees. These principles as laid down by the cases are:

1. "An occupier of real property owes as to its condition no duty to a trespasser, not even to give warning of known and concealed dangers.

2. "To a licensee coming on the premises for his own purpose, whether by invitation or mere tacit permission, there is a duty only to disclose concealed dangers not known to the licensee."[3]

The rule of non-liability to a trespasser is based on the idea that there is never any duty to anticipate his presence. To this idea the United States Supreme Court, in originating the doctrine of the turntable cases, took exception, and held that where one created on his premises an artificial condition attractive to children (*i. e.,* a turntable), he should anticipate the presence of infant trespassers, and therefore owed them the duty of taking all precautions compatible with the use of such turntable.

In most cases the same conclusion is reached whether we hold that the basis of the doctrine is that laid down by the United States Supreme Court in *Railroad* v. *Stout,*[4] as stated above, or the theory followed by the House of Lords that "in the case of young children, and other persons not fully *sui juris,* an implied license might sometimes arise when it would not in behalf of others."[5] In the case of *Ryan* v. *Towar,*[6] both bases are severely criticized, and the Court comes to the conclusion that the whole doctrine of the turntable cases is a piece of unjustifiable judicial legislation. Although in accord with this view the courts of Massachusetts, New York, New Jersey and Pennsylvania have up to the present time refused to follow the doctrine, yet it is submitted that it is sound in principle and justified by considerations of public policy, and that, in spite of assertions to the contrary, the modern tendency is toward its adoption.

In this connection a glance at three recent Pennsylvania decisions may be of value. In 1907, in the case of *Thompson* v. *R. R.,*[7] the plaintiff, while standing near the turntable with which other children were playing, was struck and injured by a projecting bar used in turning it. In holding that the de-

[3] "The Basis of Affirmative Obligation in the Law of Tort," F. H. Bohlen.

[4] 17 Wall 657, 1873.

[5] Cooley on Torts, 3d ed. 634.

[6] 128 Mich. 463, 1901.

[7] 218 Pa. 444, 1907.

fendant was not liable the Court said that the plaintiff "was where he had no right to be, on the property of the defendant which it was using in a lawful manner, for a lawful purpose, in the conduct of its business." Justice Mestrezat delivered a strong dissenting opinion. Six months later the case of *Henderson* v. *Refining Co.*,[8] came before the same court, and recovery was allowed for the death of a child caused by machinery placed by the defendant company on a lot owned by it, but which it had allowed to be used as a playground. The case of *Thompson* v. *R. R.*,[9] was not mentioned in the decision. Still more recently the case of *Millum* v. *Lehigh, etc., Co.*,[10] came before the Court on facts substantially similar to those of *Henderson* v. *Refining Co.*[11] In holding that there was evidence of actionable negligence the Court distinguished *Thompson* v. *R. R.* from *Henderson* v. *Refining Co.*, mainly in that "in the former case the child, who was injured, was considered as an intruder and a trespasser upon the property of the defendant company," whereas in the latter the defendant company permitted the use of the property "by the public as a common, or for a playground."

In most of the turntable cases there has been evidence of such permissive use of the property, and it is submitted that the Pennsylvania cases show a tendency to adopt the doctrine of the turntable cases, not indeed on the theory of *R. R.* v. *Stout*,[12] but rather on the principles laid down by the House of Lords in *Cooke* v. *Midland Great Western Ry. of Ireland*.[13]

H. E.

Foundations of Liability for Inducing Breach of Contract to Sell Land.

In a recent North Carolina case, *Swain* v. *Johnson*, 65 Southeastern, 619, the plaintiff contracted with one N to buy land. The defendant induced N to break his contract with the plaintiff, and sell the land to a corporation, of which the defendant was a member. The plaintiff claimed damages for the tort, in inducing the breach of contract, and the question was

[8] 219 Pa. 384, 1908.
[9] 218 Pa. 444, 1907.
[10] 225 Pa. 214, 1909.
[11] 219 Pa. 384, 1908.
[12] 17 Wall. 657, 1873.
[13] L. R. 1909 App. Cas. 229.

thus raised whether, when the defendant used no means, tortious in themselves, to effect his purpose, he was guilty of an actionable wrong in procuring a party to a contract, for the conveyance of land to the plaintiff, to break that contract.

The nature of the action of tort for procuring a breach of contract is well defined by Mr. Justice Brewer, when he says: "If one maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer."[1] This doctrine, of comparatively recent origin, is but an outgrowth of the ancient action, in which recovery was allowed by a master against a person enticing his servant to leave his employ.[2] This master and servant rule was extended in *Lumley* v. *Gye*,[3] in England, to the case where the defendant procured an actress to break her contract with the plaintiff to sing exclusively in his theatre. This was followed by a decision that the action would lie where the defendant induced the breach of a contract, by which a party, to whom a peculiar process of manufacturing glazed bricks was known engaged himself to exclusively glaze bricks for the plaintiff.[4] The Court in that case held the relation of master and servant did not strictly have to exist. These English decisions influenced the American courts to set up a similar liability for inducing a servant to breach his contract; and as contracts of employment are the same as other contracts, the doctrine once established, extended to all breaches of contract, as being the same in principle.[5] The principle in *Lumley* v. *Gye*, is that parties to a contract have a property right therein, any deprivation or injury of which amounts to an actionable tort.

Thus, the action is generally held to lie where there has been a wrongful inducing of a breach of contract.[6] But the courts have not been unanimous in determining what interference with a contract is wrongful, within the doctrine. A recent Maryland case[7] illustrates the line of reasoning applied in one line of cases. In that case it was held that a manufacturer is liable to a consumer for injuries caused by compel-

[1] *Angle* v. *R. R.*, 151 U. S. 1.

[2] Cases in note to 16 Am. and Eng. Enc. 2nd ed. p. 1109.

[3] 2 El. & Bl. 216.

[4] *Bowen* v. *Hall*, L. R. 62 B. Div. 333.

[5] *Vide* note 16 L. R. A. (new series) 746.

[6] *Jones* v. *Stanley*, 76 N. C. 355; *Chipley* v. *Atkinson*, 23 Fla. 218; *Tubular Co.* v. *Exeter Co.*, 159 Fed. Rep. 824 (1908); *Walker* v. *Cronin*, 107 Mass. 555.

[7] *Knickerbocker Ice Co.* v. *Baltimore Ice Co.*, 69 Atl. 405 (1908).

ling a jobber to break his contract to furnish supplies to the consumer, by threatening to withhold from the jobber the right to handle his product, on the right to do which his business success depends, for the purpose of securing to the manufacturer the direct trade of the customer. The Court said in its opinion: "It can not be denied that it is unlawful for a party to a contract to break it unless, of course, he has sufficient ground for doing so; and therefore when a third party procures or induces him to do so, he is causing him to do an unlawful act, which is itself unlawful, and the law ought to afford a remedy to the injured party." Here the Court held that the defendant's act, though not malicious, was unlawful and, therefore, actionable. In like manner, where a defendant corporation induced another to break a contract to furnish certain machines, the plaintiff was entitled to recover from the defendant damage sustained thereby, without proof that the defendant was actuated by malice or ill will.[8] It was held sufficient to found the action, if the defendant "knowingly interfered with the contract." In a leading Mass. case[9] it was said, "If such a contract—of employment—exists one who knowingly and intentionally procures it to be violated may be held liable for the wrong, although he did it for the purpose of promoting his own business."

It might be well briefly to examine this line of cases to see whether the defendant can in any way justify his actions, as being done to promote his own business. The quotation just made from *Walker* v. *Cronin* denies such a justification, and the opinion goes on to say: "every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition, but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as the result of competition or the exercise of like rights by others it is *damnum absque injuria,* unless *some superior right by contract or otherwise is interfered with.*" Inducing a breach of contract is an interference with a superior right, unless the legal right of the defendant is superior to that of the plaintiff, as where the defendant allowed X to cut paving blocks from a quarry, and X employed the plaintiff to do the work, which he did until the defendant told X that unless the plaintiff was discharged the contract would be rescinded.[10] The plaintiff could recover no damages, because

[8] *Tubular Co.* v. *Exeter Co.,* 159 Fed. Rep. 824 (1908).

[9] *Walker* v. *Cronin,* 107 Mass 555.

[10] *Roycroft* v. *Taynton,* 68 Vt. 219.

the plaintiff, it was held, only did what he had a right to do. To like effect with *Walker* v. *Cronin* is the language of the Court in the Maryland case:[11] "While lawful competition must be sustained and encouraged by law it is not lawful in order to procure the benefit for oneself, for one to wrongfully force a party to an existing contract to break it."

There is, however, another line of authorities in America, which hold the action will not lie unless unlawful means are used, such as fraud, deceit or intimidation.[12] Thus, where the plaintiff made a contract with W for the purchase of tobacco and the defendant, knowing of the contract, maliciously and on account of ill will toward the plaintiff and to benefit himself by purchasing the tobacco procured W to break his contract, it was held, that where the party has not been procured to break the contract by fraud, force, etc., except in cases of servants, an action will not lie.[13] So also where one B was induced to break her contract to perform at the plaintiff's theatre, the defendant himself desiring to procure her services, the plaintiff was not allowed to recover, his only action, it was said, being against the party with whom the contract was made.[14] The very problem before us was presented in a New York case[15] following this doctrine, the Court saying: "If A has agreed to sell property to B, C may at any time, before the title has passed, induce A to sell it to him instead, and, if not guilty of fraud or misrepresentation, he does not incur any liability. A alone must respond to B for the breach of his contract, though B might sue C if fraud were present."

The facts of the leading case also suggest the inquiry whether, the fact that the property, involved in the breach of contract, is real property makes any difference in the right to bring the action. The Court said, "we find no case where it (doctrine of liability) has ever been applied to breaches of contract to convey title to property," but they based their decision on the ground that the interference was not wrongful. *Ashley* v. *Dixon*,[15] also involved the inducing of a breach of contract to sell real property, but the nature of the property

---

[11] *Knickerbocker Ice Co.* v. *Baltimore Ice Co.*, 69 Atl. 405. See also *Doremus* v. *Hennessey*, 176 Ill. 608.

[12] *Chambers* v. *Baldwin*, 91 Ky. 121; *Bourlier* v. *McCaulay*, 91 Ky. 135; *Ashley* v. *Dixon*, 48 N. Y. 430; *Perkins* v. *Pendleton*, 90 Me. 166; *Glencoe Co.* v. *Hudson Co.*, 138 Mo. 439.

[13] *Chambers* v. *Baldwin*, 91 Ky. 121.

[14] *Bourlier* v. *McCaulay*, 91 Ky. 135.

[15] *Ashley* v. *Dixon*, 48 N. Y. 430.

was not considered by the Court in coming to its conclusion. However, cases have held that the owner of houses has a right of action against a third party, who, by his interference, causes the tenants to refuse to pay rent;[16] and moreover the fundamental right involved in a contract for the sale of land is so like that at the base of other contracts, that the reasons for allowing an action where a breach has been induced, under certain circumstances, applies equally to both.

S. D. C.

---

[16] *Gore* v. *Condon,* 87 Md. 368; *Aldridge v. Stuyvestant,* 1 Hall 210 (N. Y.).